

91-268

Supreme Court, U.S.  
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

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BRENDA DAY, PETITIONER

V.

TEXTRON CORPORATION  
RESPONDENT

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE ARKANSAS SUPREME COURT

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ANTHONY W. BARTELS  
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ATTORNEY FOR PETITIONER

---



QUESTION PRESENTED

Should the standard of review currently used by the Arkansas Supreme Court when reviewing a decision by the Workers' Compensation Commission, an administrative agency whose members are political appointees, be changed from "any substantial evidence supporting the Commission's decision" to "substantial evidence on the record as a whole", the standard currently used by the U. S. District Court and the U. S. Court of Appeals, because the equal protection clause of the United States Constitution is abrogated?



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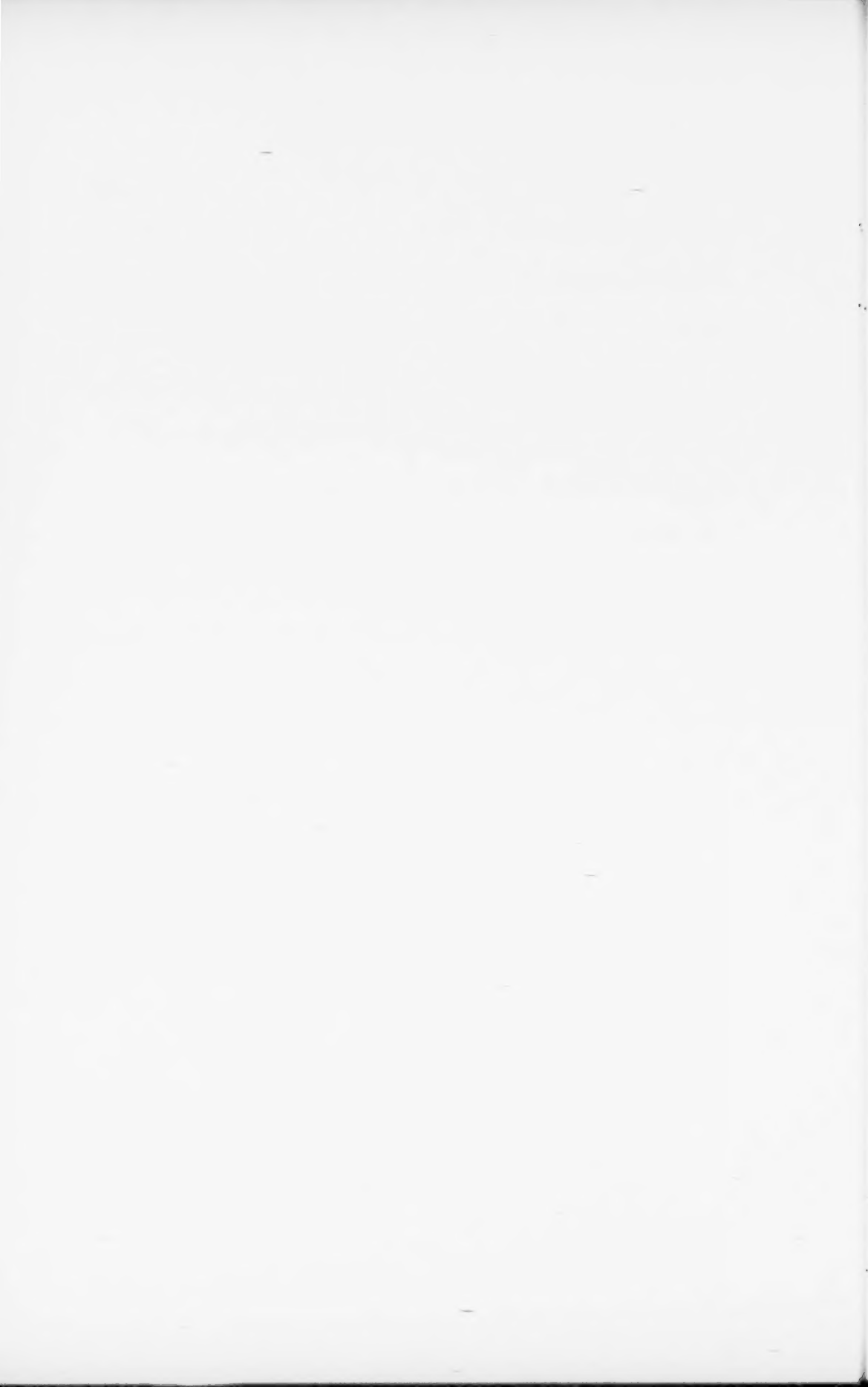


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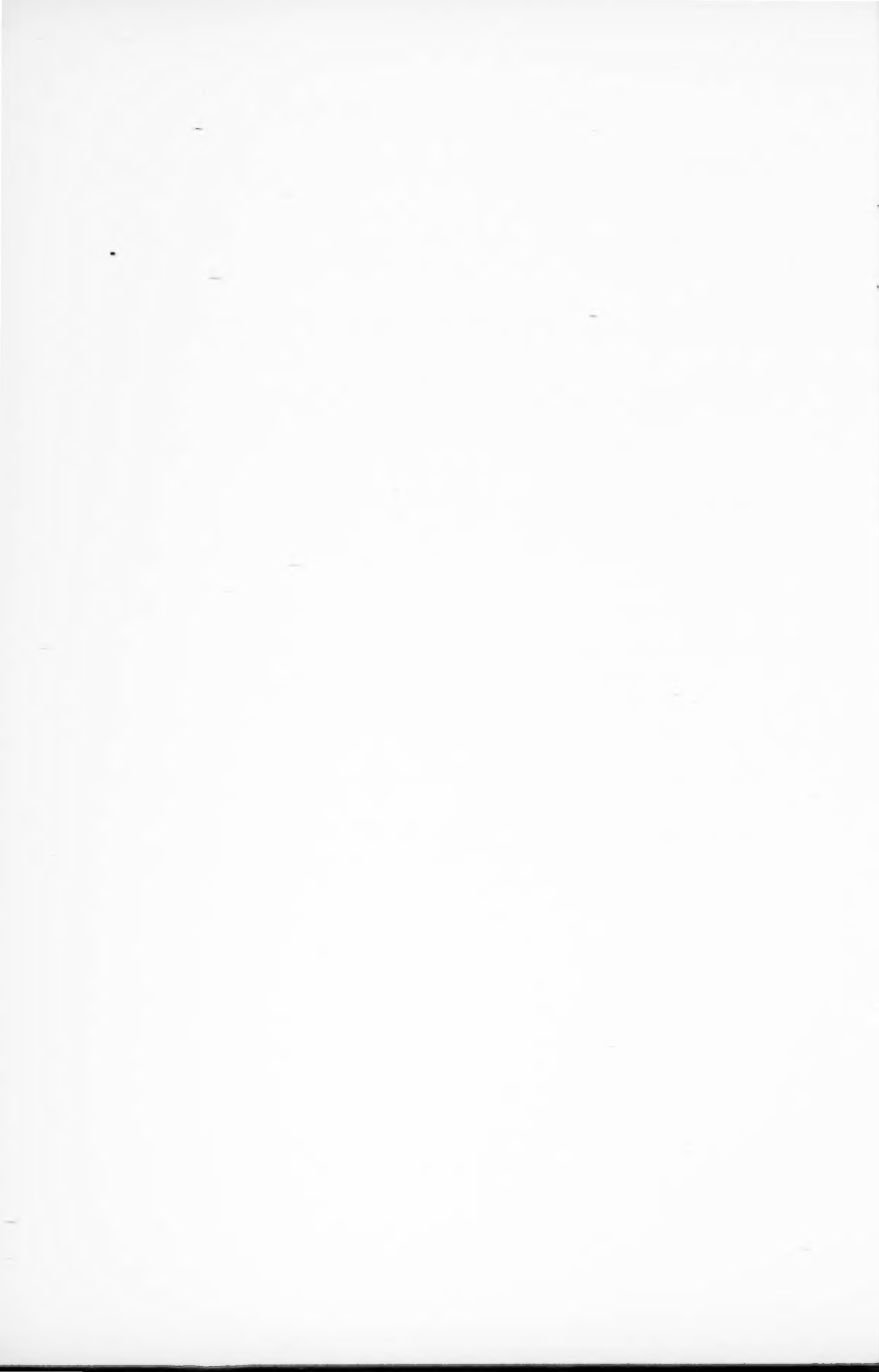
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

---

BRENDA DAY, PETITIONER

V.

TEXTRON CORPORATION

---

**PETITION FOR A WRIT OF CERTIORARI  
TO THE ARKANSAS SUPREME COURT**

The petitioner, Brenda Day, petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.



### OPINIONS BELOW

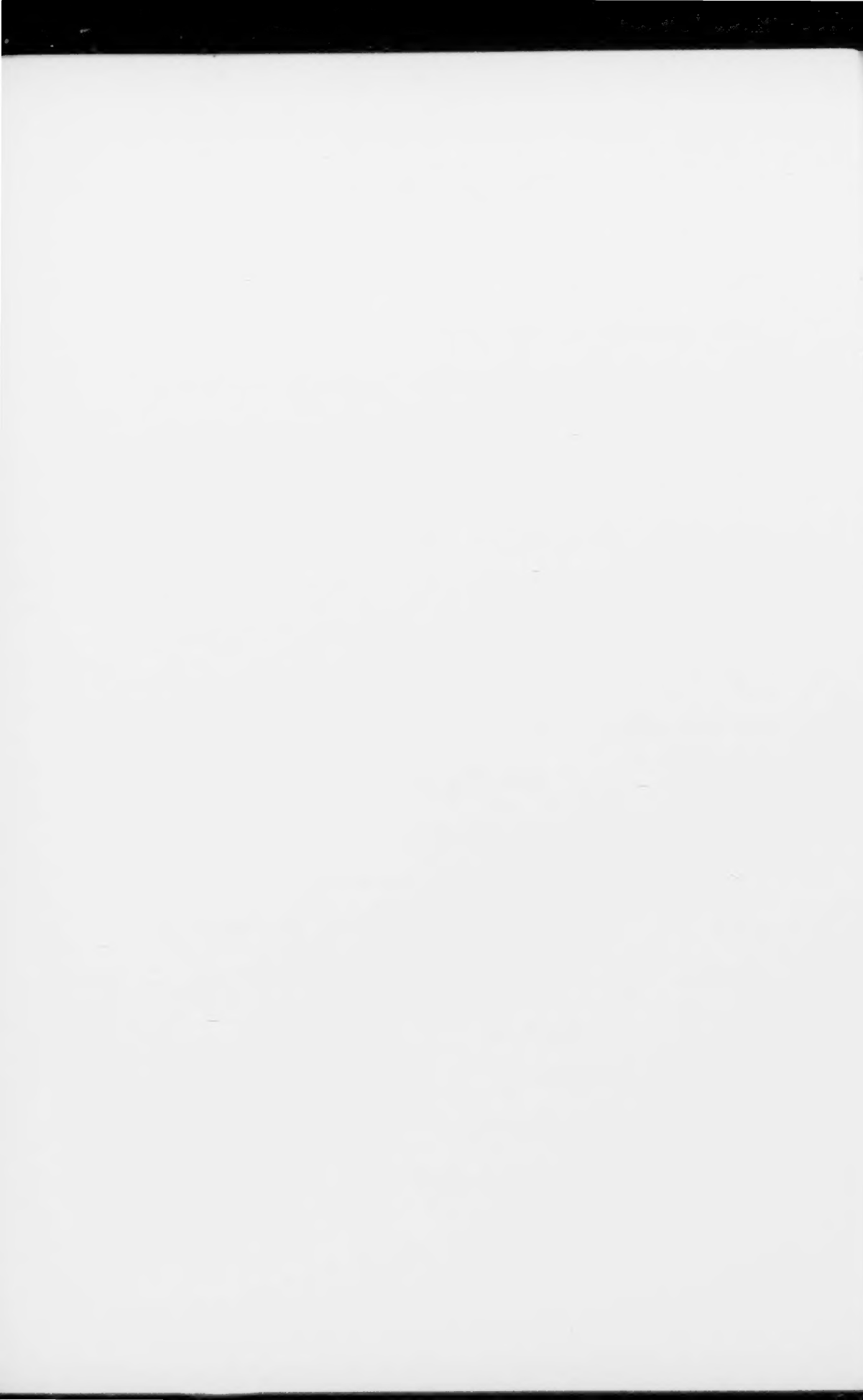
The opinion of the Arkansas Supreme Court denying the petition for review of the decision of the Arkansas Court of Appeals is unreported, but is attached hereto as Appendix A. The opinion of the Arkansas Court of Appeals denying the petition for rehearing is unreported but is attached hereto as Appendix B. The opinion of the Arkansas Court of Appeals affirming the Commission is unreported but is attached as Appendix C.

### JURISDICTION

The judgment of the Arkansas Supreme Court (Appendix A) was entered on June 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

### STATUTES INVOLVED

The relevant provision of Arkansas Code of 1987 Annotated, § 11-9-711 (b) (4) (D), is set forth in Appendix D.



STATEMENT

This case concerns § 11-9-711 (b) (4) (D), which involves the scope of judicial review of an order of the Workers' Compensation Commission. The petitioner, Brenda Day, was employed by the respondent, Textron Corporation, and received an on-the-job injury on 11/17/87 when a metal bench on which she was sitting collapsed. A hearing was held before an Administrative Law Judge (hereinafter ALJ) and in an opinion dated 9/29/89, the ALJ held that Ms. Day had sustained a compensable injury arising out of and in the course of her employment, that her healing period ended on 11/30/87, and that she was not entitled to any additional workers' compensation benefits. The ALJ's decision was appealed, and on 6/1/90 the Full Commission issued a decision affirming the ALJ's decision.

Ms. Day appealed to the Arkansas Court of Appeals, and in her appeal raised



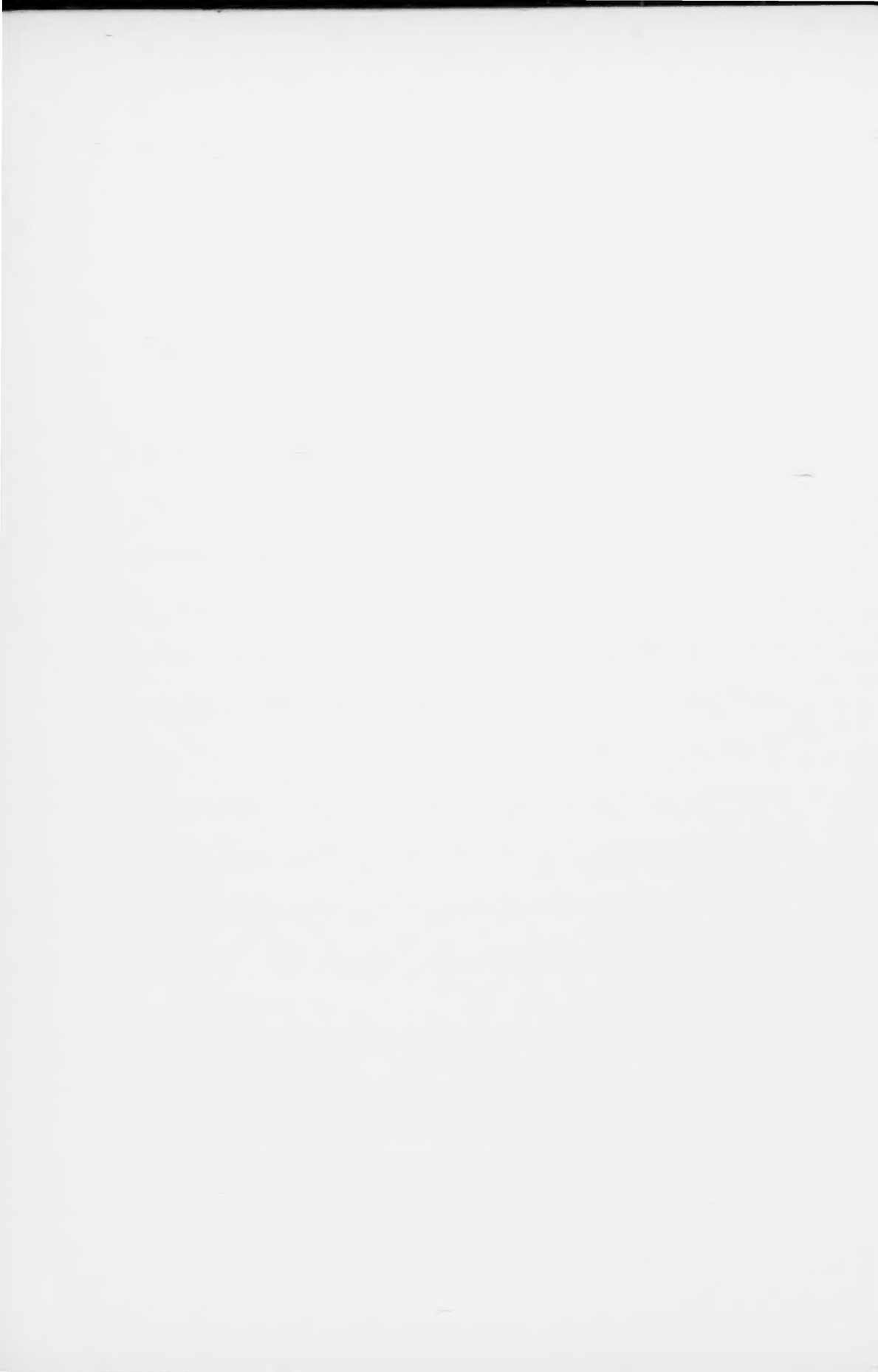
the issue of changing the present standard of judicial review. On 3/27/91, the Arkansas Court of Appeals issued a decision based on the current standard of judicial review, finding that there was substantial evidence to support the findings of the Full Commission and thus, that decision was affirmed.

Ms. Day petitioned the Arkansas Court of Appeals for rehearing, urging that a new standard of review be adopted. The petition for rehearing was denied on 5/15/91.

Ms. Day petitioned the Arkansas Supreme Court for a review of the decision of the Court of Appeals, but her petition was denied on 6/3/91.

#### REASONS FOR GRANTING THE PETITION

- I. THE STANDARD BY WHICH THE COURT OF APPEALS REVIEWS AN ORDER OF THE ARKANSAS WORKERS' COMPENSATION COMMISSION SHOULD BE CHANGED, AS THE PRESENT STANDARD INSULATES THE COMMISSION FROM JUDICIAL REVIEW OF ARBITRARY DECISIONS WHICH ARE NOT SUPPORTED BY THE RECORD AS A WHOLE.





The present standard of judicial review by which the Arkansas Court of Appeals reviews a decision of the Arkansas Workers' Compensation Commission is whether the order is supported by any substantial evidence. Arkansas Code of 1987 Annotated, § 11-9-711 (b) (4) (D). In reviewing the decision of the Workers' Compensation Commission, the Court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the commission, and must uphold the Commission's findings if there is any substantial evidence to support them, even if a preponderance of the evidence would indicate a different result. Tahutini v. Tastybird Foods, 18 Ark. App. 82, 711 S.W. 2d 173 (1986); Johnson v. Hux, 28 Ark. App. 187, 722 S.W. 2d 362 (1989).

The Court's present standard of review, which is the substantial evidence, has been criticized by some members who



now sit on the Supreme Court, who used to sit on the Arkansas Court of Appeals, and who have now had time to reflect on this procedure. As a concurring opinion stated:

"As a member of that court in 1979 and 1980, I began to question the wisdom of composing a quasi-judicial body, such as the commission, of advocates for the points of view always at odds in the cases before it. My skepticism has since grown, and I must take this opportunity to discuss a law that requires us to hold, as we do today, that a commissioner is disqualified because his background is not of the sort that will assure he is sufficiently partial.

The creation of an entity such as the commission, which is recognized to be an administrative body but which has one function which is purely adjudicative, brings on problems associated with courts . . . . Although it is not a court per se, the commission has replaced the courts' adjudicative function with respect to the claims of injured workers, at least at the first hearing and review levels."

\* \* \*

" Despite the fact that it is the ALJ who hears the witnesses and has the opportunity to see them face to face, we persist in holding that his or her decision is meaningless when a



decision of the commission is on appeal."

\* \* \*

" Given the changes going on around us and given the changes which have come about by necessity in our own workers' compensation scheme since our commission was created by Initiated Act 4 of 1948, it occurs to me that we should be thinking of creating a system in which the decisions of the ALJs are like those of juries, to the extent that the factual determinations should be reviewed only to determine if they are supported by substantial evidence. An alternative would be to review them as the factual decisions of trial judges are reviewed in other civil cases, i.e., to determine if they are clearly erroneous or clearly against the preponderance of the evidence. Ark. R.Civ.P. 52(a).

No matter what standard of review is chosen, however, the reviewing body need not be poised to recreate the adversarial arguments and adversarial positions taken and protected at the hearing level. Requiring management and labor representatives on such a reviewing body, so analogous to a court, is like assuring that our court of appeals or this court be composed of equal numbers of plaintiffs' advocates and defendants' advocates in tort cases. In any body exercising the function of legal review, the public is entitled to, and should demand the putting aside of social philosophies which are the stuff of legislation. That may not be entirely possible, but at the very



least, we should not encourage the advocacy of such points of view when we are empowering a tribunal to interpret the law and apply it to facts rather than to make the law to be applied."

Webb v. Workers' Compensation Commission,  
733 S.W. 2d 726, 727-728 (Ark. 1987).

There is a good discussion on "scope of review" contained in Gellhorn, Byse, Strauss, Rakoff, Schotland, Administrative Law--Cases and Comments, 349 (8th ed. 1988), as follows:

" If we envision scope as a spectrum, there is agreement about the end-points. At one extreme, the administrative determination is conclusive, that is, the reviewing court must accept the administrative decision; this is in fact no review at all, and is extremely rare in American law. At the other extreme, 'de novo' review gives the administrative determination no effect, that is, the court exercises its own judgment wholly independent of the agency's decision; although not as rare as no review at all, de novo review is not widely used. Between those extremes occurs the overwhelming bulk of judicial review, with a range of degrees of judicial aggressiveness or restraint, described by formulaic phrases such as 'clearly erroneous,' 'substantial evidence on the whole record,' and 'arbitrary and capricious' or 'an abuse of discretion', each

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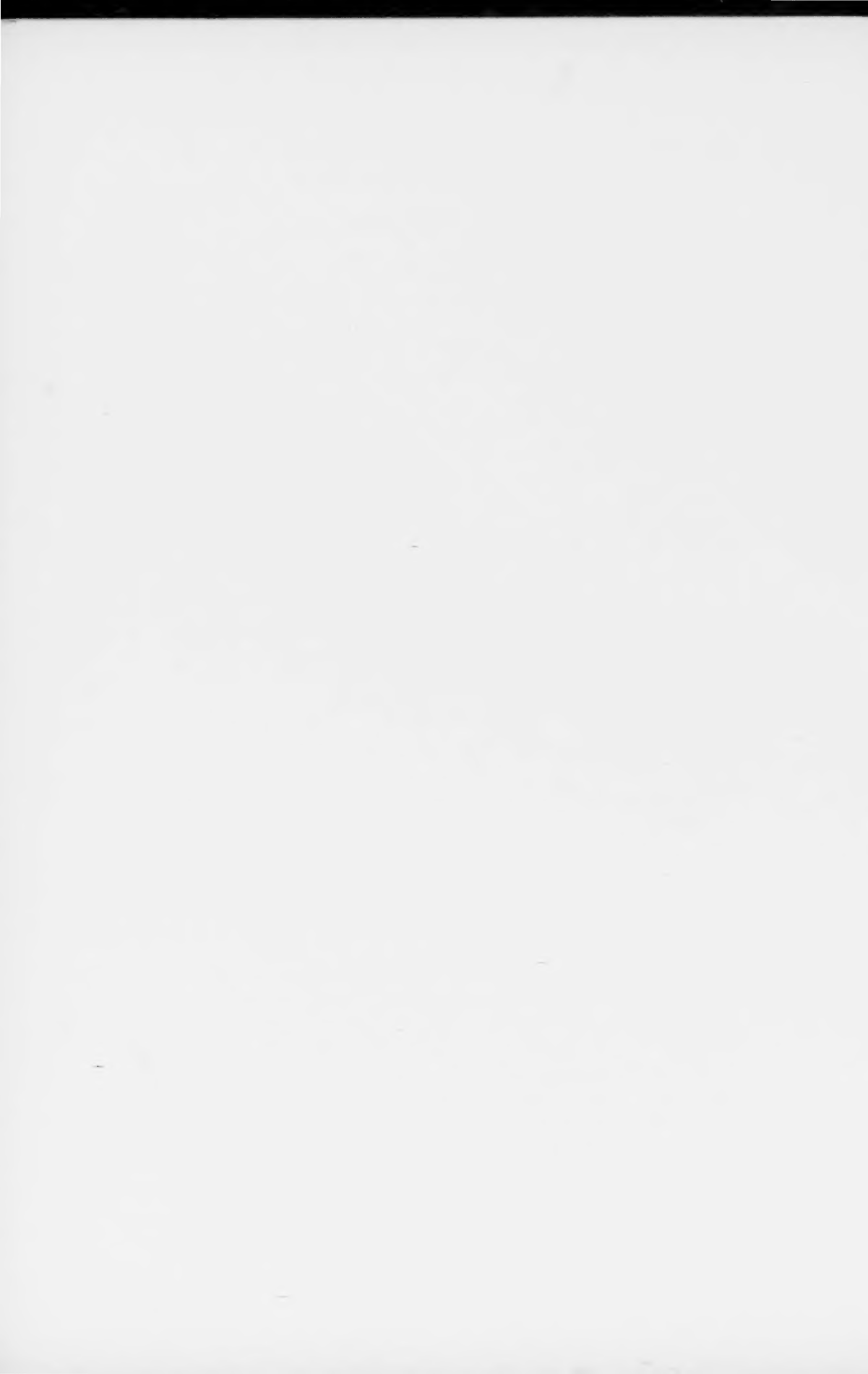
purportedly describing a  
'differential deferential role.'

Judges and brief-writers in thousands of cases go on at length, especially in recent decades, about which scope is applicable or how it should be applied. At risk of overstating positions, we may categorize four divergent views about what all that writing means. We might call one view 'realist' (some might call it nihilist):

At best concepts such as 'substantial evidence' tend to be a little more than convenient labels attached to results reached without their aid . . . . [We suspect] that the rules governing judicial review have no more substance at the core than a seedless grape . . . . Nevertheless, despite this recognition of the essential meaninglessness of the accepted formulae of judicial review, the rules unaccountably command endless attention in the classroom and legal literature.

A second view may be called 'reductionist':

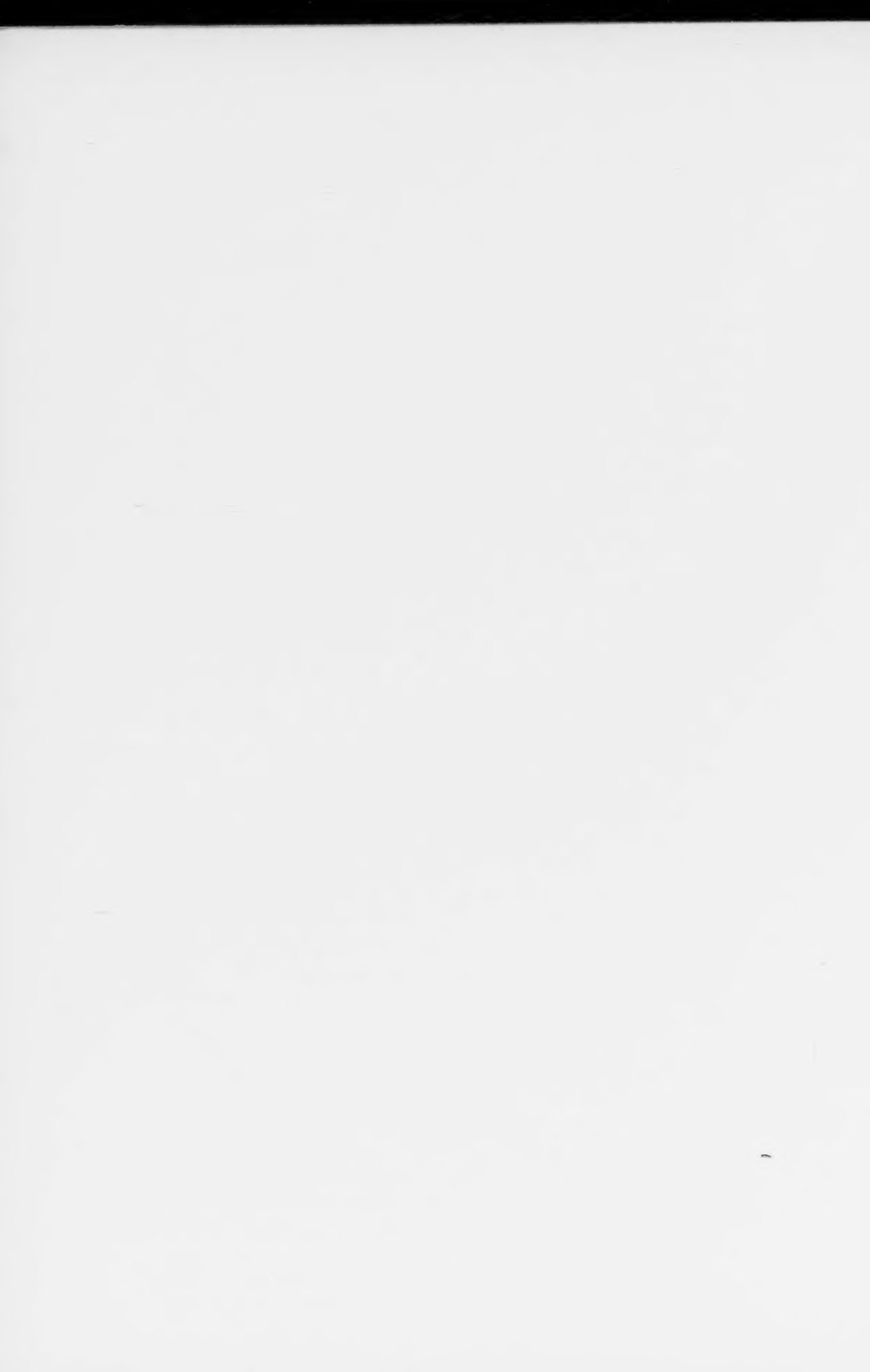
The scope of review varies all the way from total unreviewability to *de novo* review, but the dominant scope of review is in the middle: Courts usually substitute judgment on the kind of questions of law that are within the special competence, but on other questions they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction. The italicized



statement is in general an adequate summary of the main idea of the law of scope of review and may be more reliable than the many complexities and refinements that are constantly repeated in judicial opinions.

A third view may be called 'formalist,' attaching much weight to which formula is employed and making many refinements in how the formulas should apply to different actions or issues under review. By no means is formalism removed from realities: many statutes reflect legislative struggles over what scope of review formula should be used, and one of the fullest Congressional efforts regarding Administrative Law in this generation has involved an effort to amend the APA's provisions on scope.

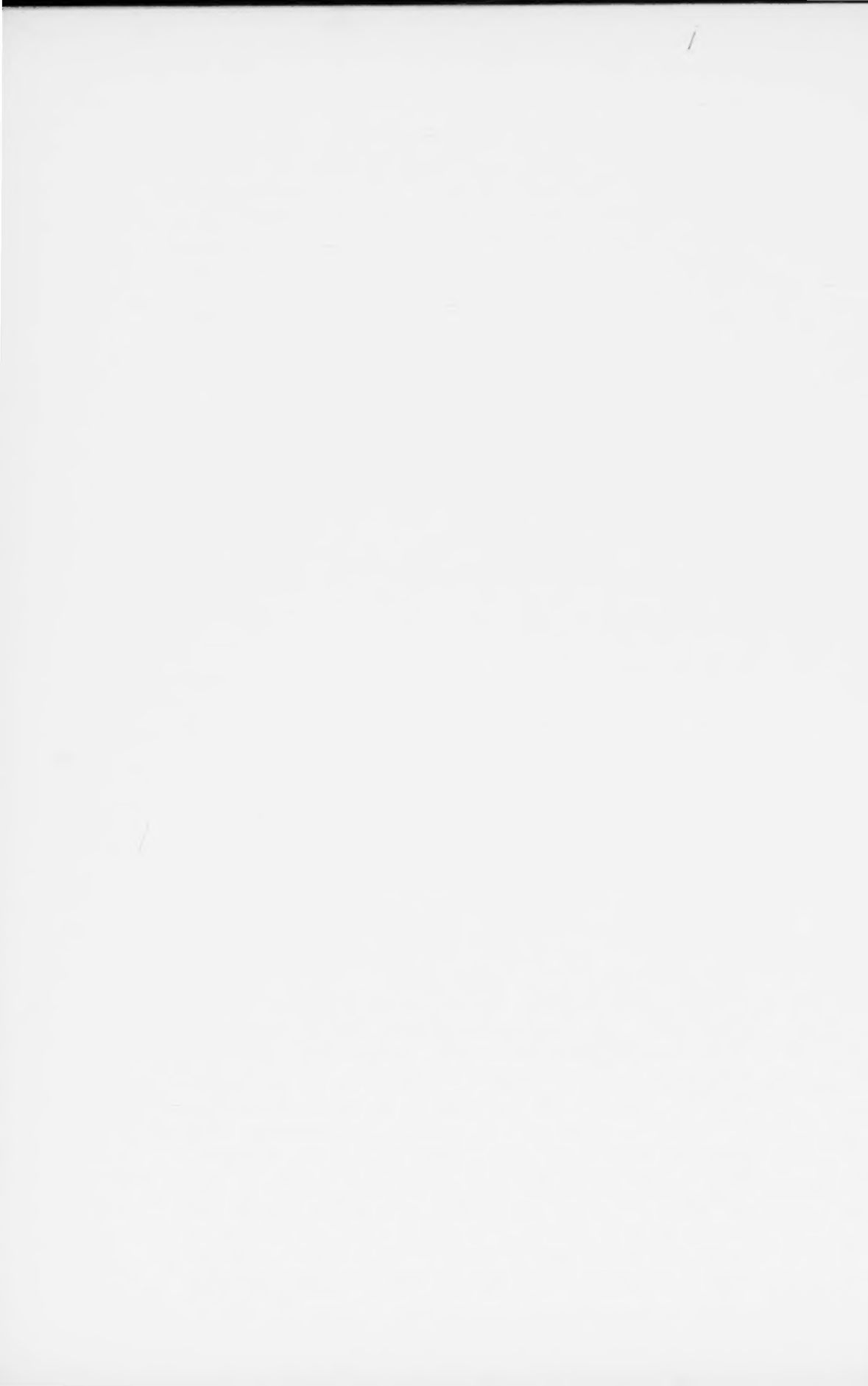
A fourth view, finally, might be labeled 'pragmatic.' Scope must be dealt with, **first** because different statutes use the language of scope to fill in the 'partnership agreement' between different agencies and the courts: if the formulaic phrases are used to allocate functions and degrees of responsibility, then whether one is involved in legislating, administering or litigating, one needs a working sense of what the statutory language calls for. **Second**, reflecting such statutes and much judge-made law, there is a vast body of judicial opinion on scope: 'we should not assume that our judges are dissemblers' and certainly the opinions must be susceptible to analysis if one is to say how existing law may bear on a new matter. **Third**, a number of well-recognized factors operate to



invoke more deferential or more aggressive review; awareness of these factors helps greatly in analyzing precedent and predicting results. Last, going beyond (or to a different level of) pragmatism, if neither formulas nor discoverable factors are operating with reasonable consistency, then the 'senior partner' is intervening as it freely chooses whenever it freely chooses, an assertion about the judiciary that is at once both unrealistic and in a democracy, unacceptable." (footnotes omitted)

In Universal Camera Corp. v. National Labor Relations Board, Supreme Court of the United States, 1951, 340 U.S. 474, the Court discussed the scope of review by stating:

" . . . Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being



justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence of both. . . . Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals."

The Arkansas Court of Appeals should consider "the record as a whole" in workers' compensation cases and not deem itself merely a judicial echo or a rubber stamp of the Board's conclusion.

In Ms. Day's case, the record "as a whole" supported a decision that if the claimant reached the end of her healing period then she suffered some degree of permanent partial disability and was entitled to additional benefits.

Prior to claimant's on-the-job injury, she was a healthy person capable of engaging in sustained employment. Now, she is mentally and physically unable to work, and there is no evidence of any other contributing factor other than her injury in November of 1987. Because the





medical evidence unequivocally establishes a causal connection between claimant's current incapacitation and her on-the-job injury in November of 1987, it was a miscarriage of justice for the Arkansas Court of Appeals and the Supreme Court of Arkansas to affirm the decision of the Full Commission using the current standard of judicial review.

Should the standard of review be adopted as set out above, there will not be as many appeals, and the Commission will not act as boldly when it knows that its work is going to be more carefully reviewed.

The Fourteenth Amendment guarantees equal protection of the law. Why should the administrative agency change from "liberal" to "conservative" because of the appointees to the administrative agency? The agency should remain consistent so as to treat all equally.

In a subsequent case, the Arkansas Supreme Court has agreed to consider the



proper standard of review for an administrative agency. Scarborough v. Cherokee Enterprises, No. 91-54. If the law changes, then this case should be remanded to conform to the new law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted, ~~ORIGINAL SIGNED BY~~

*Anthony W. Bartels*

Anthony W. Bartels  
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Phone: (501) 972-5000  
Ark. Bar ID No: 68005

July 30, 1991.

ORIGINAL ENGLISH BY  
J. H. B. J. H. B. J. H. B.

APPENDIX A

Office of the Clerk  
Supreme Court of Arkansas  
Arkansas Court of Appeals  
Justice Building  
625 Marshall  
Little Rock, AR 72201

Leslie W. Steen  
Clerk

Rae W. Millard  
Deputy

Robin Horne  
Chief Deputy

Greta Bivins  
Deputy

Melissa Fuller  
Chief Deputy

Sam Harris  
Deputy

Janie Owen  
Deputy

Daniel Dodson  
Deputy

Denise Parks  
Deputy

Holi North  
Deputy

Ginger Mullins  
Deputy

June 3, 1991

Anthony W. Bartels  
Attorney at Law  
P. O. Box 1640  
Jonesboro, AR 72403

RE: 91-89 Brenda Day v.  
Textron Corporation

Dear Mr. Bartels:

The Supreme Court made the following  
order in the above styled case today:



"Petition for Review is denied.  
Corbin, J., would grant."

Sincerely yours,

/s/Leslie W. Steen  
Leslie W. Steen, Clerk

LWS:rh

cc: Todd Williams





APPENDIX B

Office of the Clerk  
Supreme Court of Arkansas  
Arkansas Court of Appeals  
Justice Building  
625 Marshall  
Little Rock, AR 72201

Leslie W. Steen  
Clerk

Rae W. Millard  
Deputy

Robin Horne  
Chief Deputy

Greta Bivins  
Deputy

Melissa Fuller  
Chief Deputy

Sam Harris  
Deputy

Janie Owen  
Deputy

Daniel Dodson  
Deputy

Denise Parks  
Deputy

Holi North  
Deputy

Ginger Mullins  
Deputy

May 15, 1991

Anthony W. Bartels  
Attorney at Law  
P. O. Box 1640  
Jonesboro, AR 72403

RE: CA90-352 Brenda Day v.  
Textron Corporation

Dear Mr. Bartels:

The Arkansas Court of Appeals made  
the following order in the above styled  
case today:



"Petition for Rehearing is denied."

Sincerely yours,

/s/Leslie W. Steen  
Leslie W. Steen, Clerk

LWS:rh

cc: Todd Williams  
Commission  
(WCC No. D716477)



APPENDIX C

ARKANSAS COURT OF APPEALS

BRENDA DAY, APPELLANT

V. NO. CA90-352

TEXTRON CORPORATION, APPELLEE

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Opinion Delivered March 27, 1991

APPEAL FROM ARKANSAS  
WORKERS' COMPENSATION COMMISSION  
(D716477)

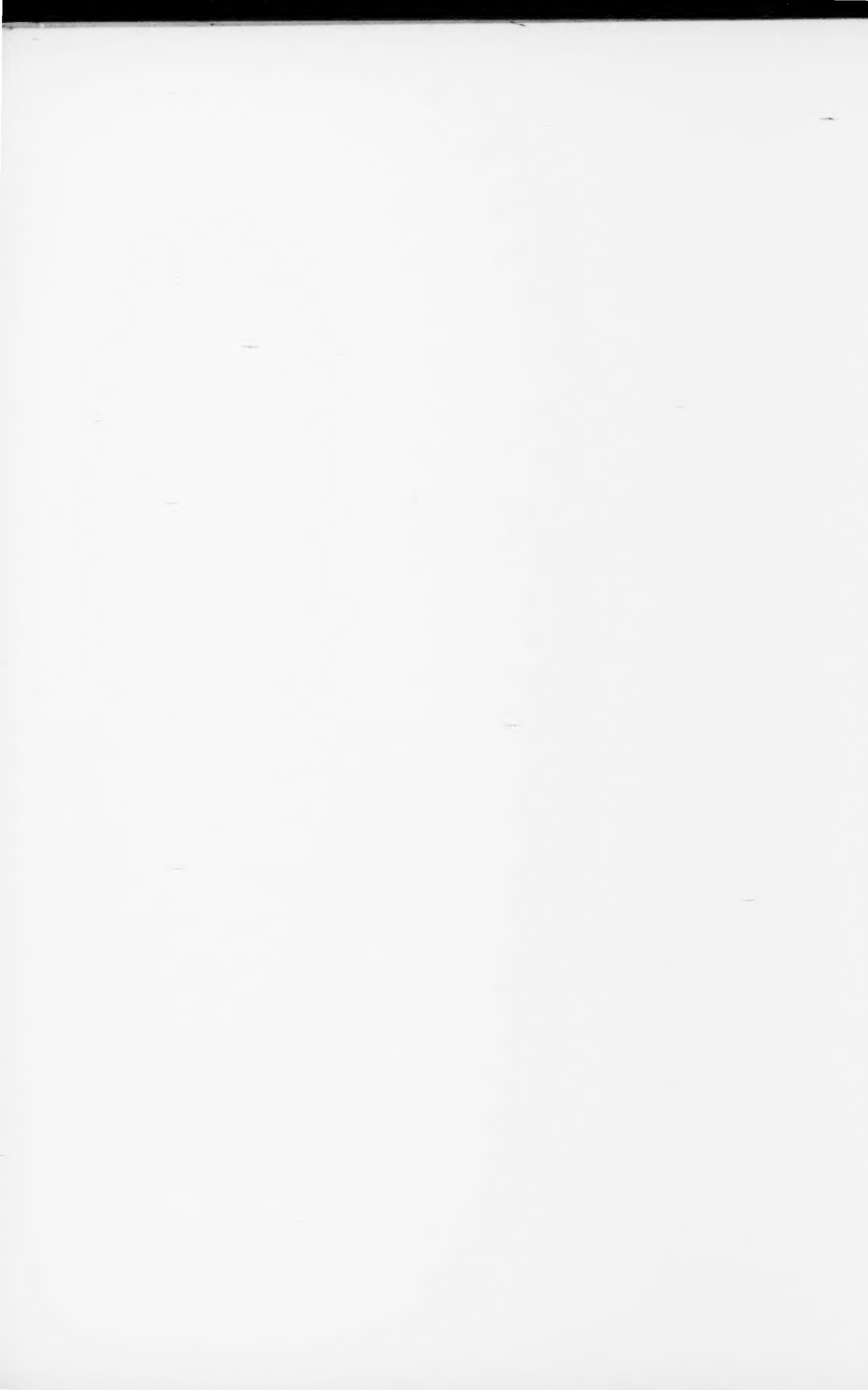
AFFIRMED

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ELIZABETH W. DANIELSON, Judge

Appellant Brenda Day sustained a compensable on-the-job injury to her neck, shoulder, hip, and back on November 17, 1987, when a bench she was sitting on collapsed. She was paid temporary total disability benefits through November 30, 1987, the date that Textron claims Day reached the end of her healing period.

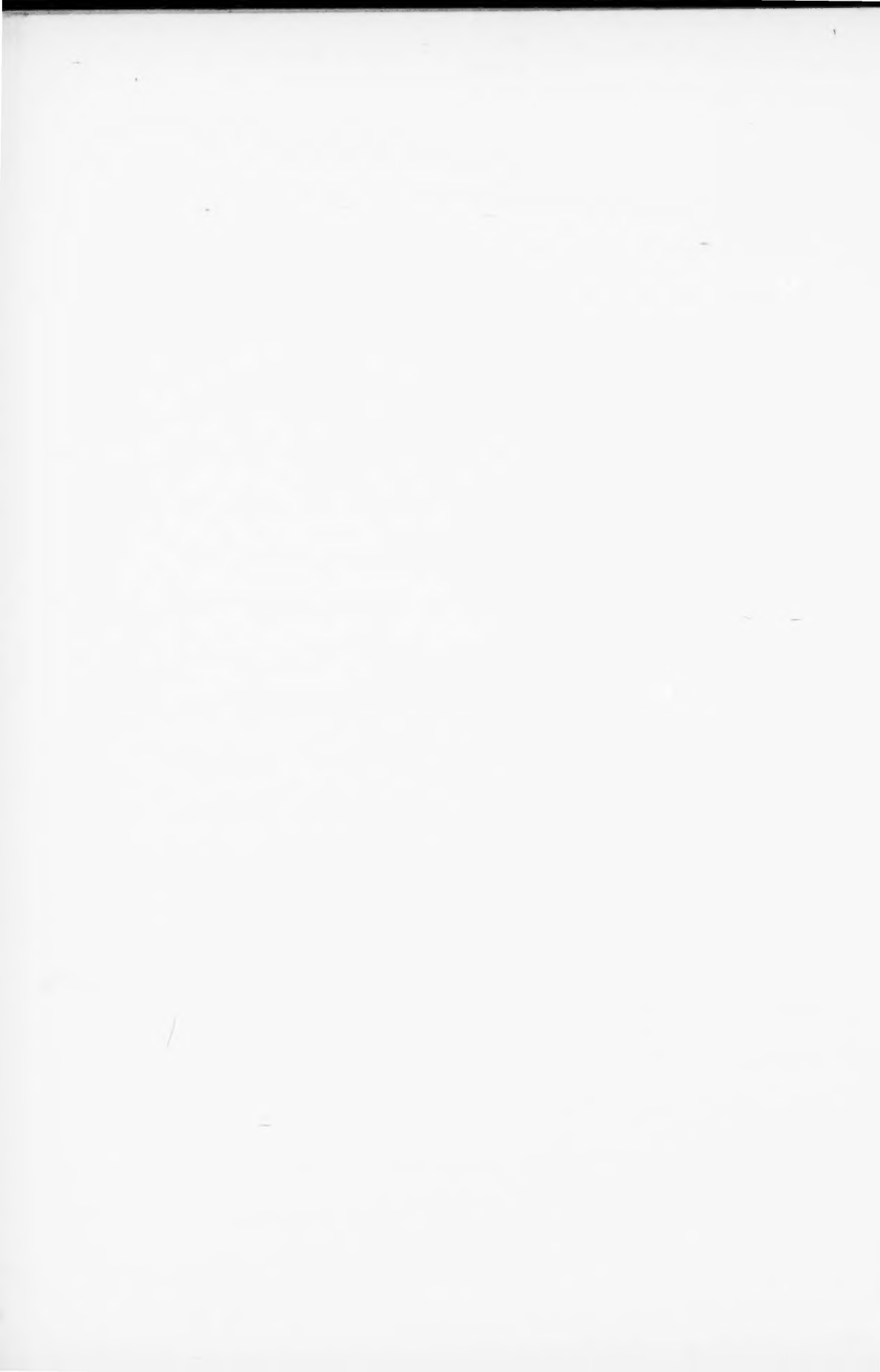
Day filed a claim with the administrative law judge requesting additional disability for alleged medical



problems occurring after November 30, 1987. The administrative law judge and subsequently the Arkansas Workers' Compensation Commission found for Textron. We affirm.

Day was examined the day of the accident by Dr. Osborn, who stated in his office notes that she should be able to return to work in a few days. She was then seen by Dr. Higley on November 23, 1987, and he reported that she could return to regular work on November 30, 1987. In fact, of the seven physicians who examined Day in the nine months following her alleged injury, none stated that she could not return to work. Although two of the doctors said that she was temporarily totally disabled beyond December of 1987.

On May 23, 1988, an independent medical examination was conducted by Dr. Larry Mahon at which time he determined that Day had some "subjective tenderness





over her left shoulder, but does have normal muscle strength." Dr. Mahon reported that Day's healing period had ended prior to his examination and that she had no permanent partial impairment as a result of the alleged injury of November 1987.

In a claim before the Workers' Compensation Commission, the claimant has the burden to prove entitlement to benefits by a preponderance of the evidence. Morrow v. Mulberry Lumber Co., 5 Ark. App. 260, 635 S.W. 2d 283 (1982). The only evidence Day has offered to establish that her healing period has not ended and that she is entitled to continued temporary total disability benefits is her own testimony, which has been contradicted by all of the medical reports introduced into evidence.

The commission found that Day's testimony lacked credibility. At the hearing before the administrative law



judge, she said all of her medical problems resulting from a non-compensable 1985 injury ended three months after that accident occurred. However, sixteen months after that injury and four months after her work-related injury, she told Dr. Stickel of eleven different complaints she allegedly was experiencing from the 1985 fall.

In reviewing the decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the commission, and will affirm if there is any substantial evidence to support the findings made. Johnson v. Hux, 28 Ark. App. 187, 722 S.W. 2d 362 (1989). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion. San Antonio's Shoes v. Beaty, 28 Ark. App. 201, 771 S.W. 2d 802 (1989).



We find, based on the evidence from the hearing below, that there is substantial evidence to support the findings of the full commission.

Affirmed.

Cracraft, C. J., and Jennings, J., agree.



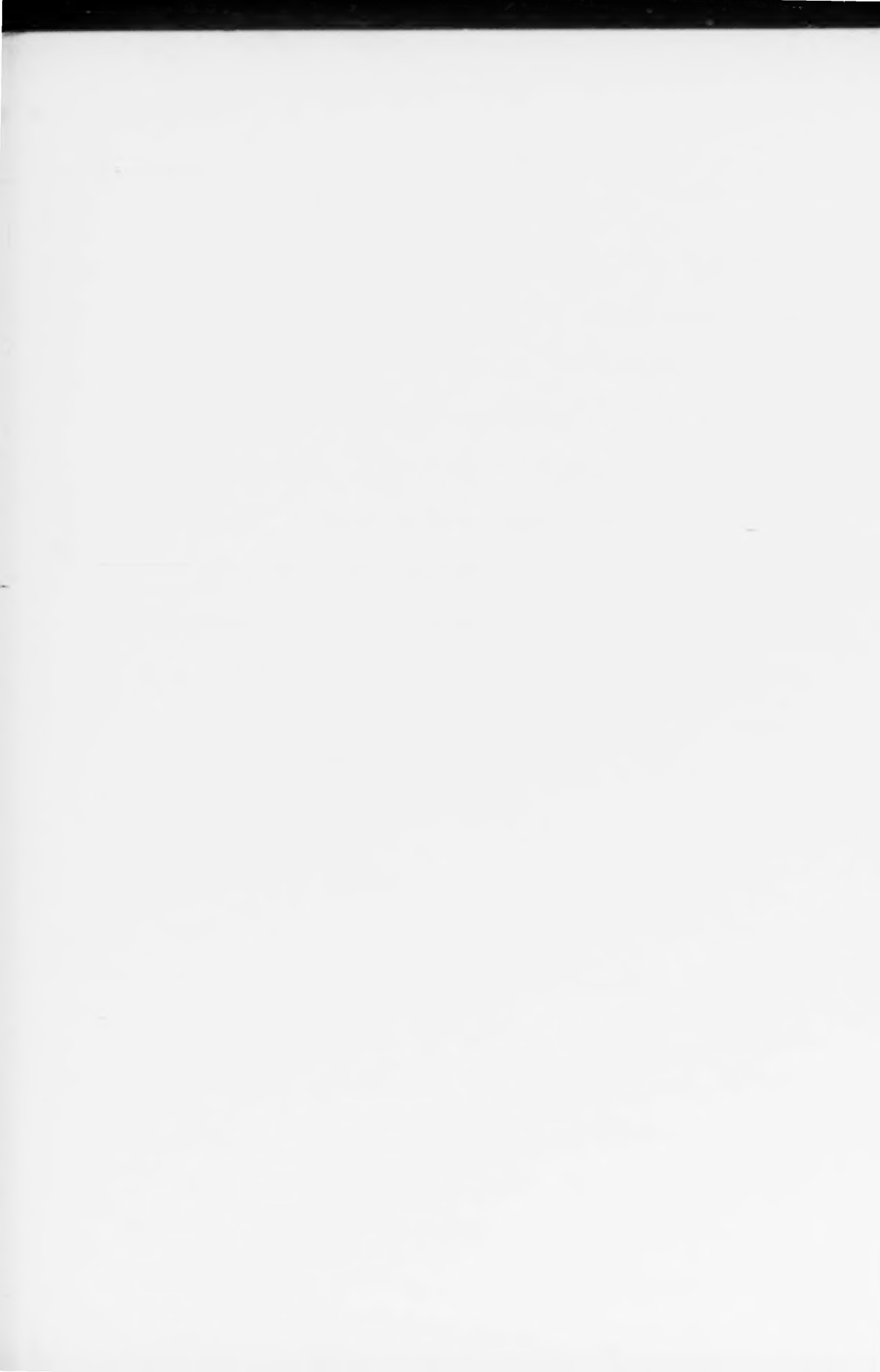
APPENDIX D

11-9-711.        Finality        of        order        or  
award--Review.

(a)    AWARD    OR    ORDER OF ADMINISTRATIVE  
LAW    JUDGE OR SINGLE COMMISSIONER--REVIEW.

(1)    A    compensation    order or award of an  
administrative    law    judge    or    a    single  
commissioner    shall    become    final    unless    a  
party    to    the    dispute    shall,    within    thirty  
(30)    days    from    the    receipt    by    him    of    the  
order    or    award,    petition    in    writing    for    a  
review    by    the    full    commission    of    the    order  
or    award.

(2)    Any    party    to    the    dispute    may    cross  
appeal    by    filing    a    written    petition    for  
cross    appeal    within    fifteen    (15)    days  
after    the    notice    of    appeal    is    filed    in    the  
office    of    the    commission,    except    that    in  
no    event    shall    a    cross    appellant    have    less  
than    thirty    (30)    days    from    the    receipt    by  
him    of    the    order    or    award    within    which    to  
file    a    notice    of    cross    appeal.





(b) AWARD OR ORDER OF COMMISSION--  
APPEAL. (1) A compensation order or award of the Workers' Compensation Commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Court of Appeals, which is designated as the forum for judicial review of those orders and awards.

(A) The appeal to the Court of Appeals may be taken by filing in the office of the commission, within thirty (30) days from the date of the receipt of the order or award of the commission, a notice of appeal, whereupon the commission under its certificate shall send to the court all pertinent documents and papers, together with a transcript of evidence and the findings and orders, which shall become the record of the cause.



(B) Any other party to the dispute may cross appeal by filing in the office of the commission a notice of cross appeal to the Court of Appeals within fifteen (15) days after the notice of appeal is filed, except that in no event shall a cross appellant have less than thirty (30) days from his receipt of the order or award of the commission within which to file a notice of cross appeal.

(2) Appeals from the commission to the Court of Appeals shall be allowed as in other civil actions and shall take precedence over all other civil cases appealed to the court.

(3) Upon appeal to the Court of Appeals, no additional evidence shall be heard. In the absence of fraud, the findings of fact made by the commission, within its power, shall be conclusive and binding upon the court and shall be given



the same force and effect as in cases heretofore decided by the Supreme Court of Arkansas, except subject to review as in subdivision (b) (4) of this section.

(4) The court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:

(A) That the commission acted without or in excess of its powers;

(B) That the order or award was procured by fraud;

(C) That the facts found by the commission do not support the order or award;

(D) That the order or award was not supported by substantial evidence of record.

(c) APPEAL COSTS. In all appeals the cost shall be assessed as provided by law in civil cases. The commission may require a bond from either party, if it



deems necessary, in cases appealed to the Court of Appeals.

(d) SCHOOL DISTRICT EMPLOYEES. The action taken by the Workers' Compensation Commission with respect to the allowance or disallowance of any claim filed by a school district employee shall be subject to appeal to the circuit court as provided for in subsection (b) of this section.

(2)  
No. 91-268

Supreme Court, U.S.  
F I L E D

SEP 3 1991

OFFICE OF THE CLERK

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In The  
**Supreme Court of the United States**  
October Term, 1991

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BRENDA DAY,

*Petitioner,*

vs.

TEXTRON CORPORATION,

*Respondent.*

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**Petition For Writ Of Certiorari To The  
Arkansas Supreme Court**

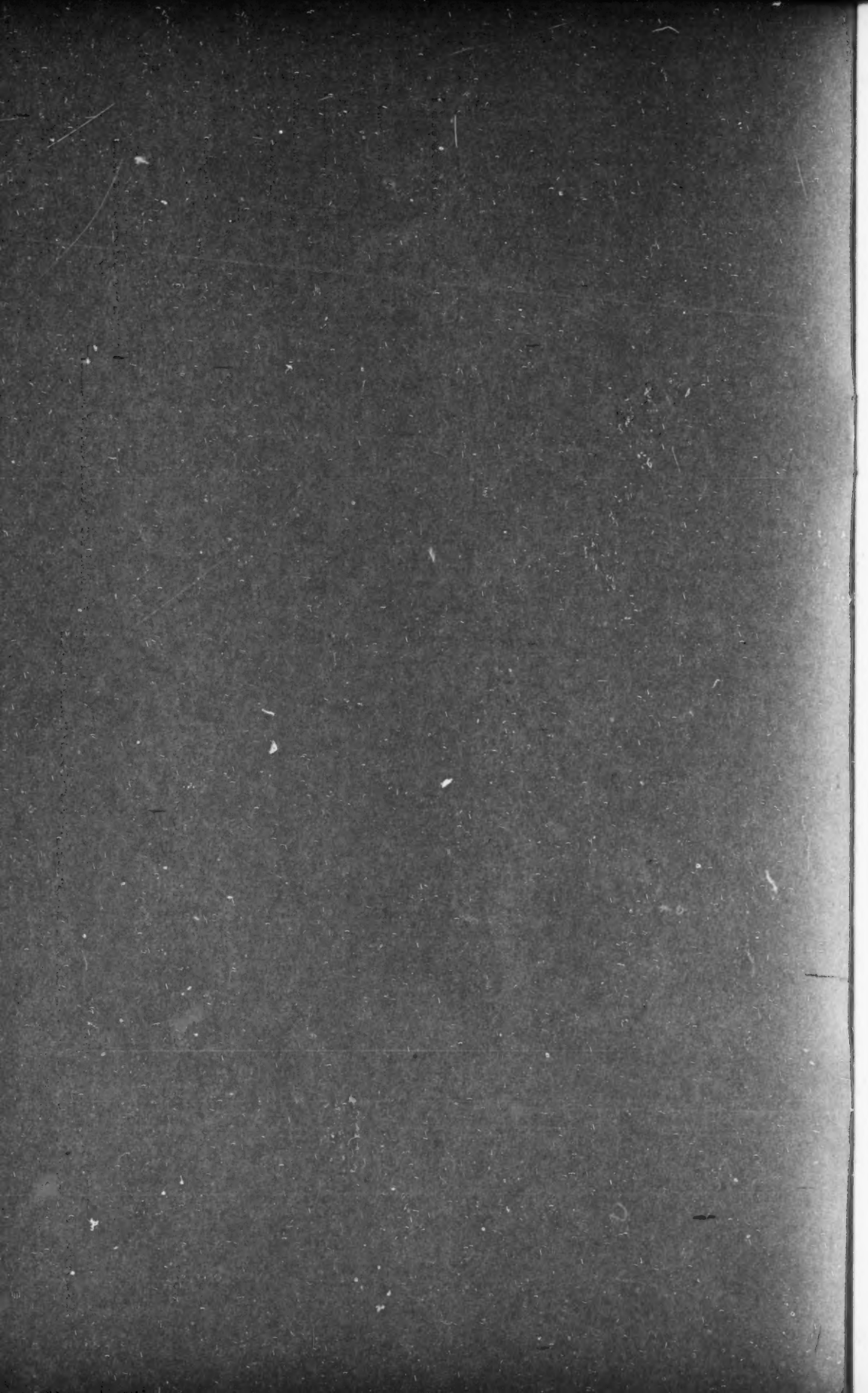
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**RESPONDENT'S BRIEF IN OPPOSITION**

---

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LOVETT  
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Jonesboro, AR 72403-1346  
*Attorney for Respondent*





**QUESTION PRESENTED**

Should this court review a decision of the Arkansas Court of Appeals and Arkansas Supreme Court involving the interpretation of an Arkansas statute governing the appeals process and standard of review in Arkansas Workers' Compensation claims.

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## STATEMENT OF THE CASE

Brenda Day, petitioner, brought a workers' compensation claim against respondent Textron Corporation for injuries she claimed to have sustained on the job. She had a full hearing before an Administrative Law Judge, and the Judge held that she was not entitled to any additional benefits.

Petitioner appealed this decision to the Full Commission, a panel of three (3) judges, who reviewed the decision *de novo* and affirmed the Administrative Law Judge's ruling.

Petitioner subsequently appealed to the Arkansas Court of Appeals, which also affirmed the Commission. Petitions for Rehearing to the Arkansas Court of Appeals and for review to the Arkansas Supreme Court were denied.

The standard of review for Arkansas Workers' Compensation cases on appeal to the Arkansas Court of Appeals is governed by Ark. Code Ann. § 11-9-711(b) (4), which contains four (4) grounds for reversal. One of those grounds is that the Order or award was not supported by substantial evidence of record.

It is this statute and standard of review that petitioner contends should be reviewed by the United States Supreme Court.

## ARGUMENT

### REASONS FOR DENYING THE WRIT

Petitioner has stated no grounds for this court to issue a Writ of Certiorari pursuant to Rule 10 of the Rules of the Supreme Court. It is clear from a review of Rule 10 that there could be no basis.

There is no constitutional issue or other federal question decided in the proceedings below. Certainly there has not been a decision involving a federal question which conflicts with the decisions of other state courts or of a United States Court of Appeals. The decision does not involve an important question of federal law which should be settled by this court, nor has it decided a federal question in a way that conflicts with applicable decisions of this Court. There was no departure from the usual course of judicial proceedings by the state judicial bodies and appellate courts which decided this case. Finally, there are no special or important reasons for this court to review the case.

This case simply involves the standard of review which the Court of Appeals and Supreme Court use in deciding appeals from the Arkansas Workers' Compensation Commission. The same standard applies to all claimants and all employers. This is strictly a matter of state law, and does not involve any federal or constitutional issues.

The only mention of the United States Constitution in petitioner's brief is a one paragraph reference to the equal protection guarantees of the Fourteenth Amendment on page 16 of the petitioner's brief. This is apparently only a reference to the fact that the Workers'

Compensation Commission may at times be "liberal" and at other times "conservative", depending on the appointees to the Commission. Petitioner contends that the Commission should remain consistent so as to treat all equally. First, it is obviously not a violation of the Equal Protection Clause that some judges are more liberal or conservative than others. Obviously, federal judges are subject to the same variances. Secondly, petitioner does not identify a class of claimants who are treated differently than other claimants who need the protection of the Fourteenth Amendment. This Court stated in *Jones v. Helms*, 452 U.S. 412 (1981), that "the Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way." As in *Jones v. Helms*, there is nothing in petitioner's argument or in the record which suggests that this statute has been applied differently in this case than it would be in any other case. The statute does not subject "one caste of persons to a code not applicable to another." This Court stated in *Jones v. Helms* that the Equal Protection Clause requires that the state govern impartially. "General rules that apply even handedly to all persons within the jurisdiction unquestionably comply with this principal." *Id.*, quoting from *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, 59 L. Ed. 2d 587, 99 S. Ct. 1355.

Thus, the only mention by petitioner of a constitutional or federal question is to a provision in the Constitution which has no application to this Petition.



— Additionally, petitioner has not raised this issue in a manner which gives this court a basis to grant her Petition. In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court stated that a “generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights. . . .” This is all the petitioner has done in this case, and accordingly the Petition should be denied.

Finally, petitioner’s argument concerns a state court’s standard of review of a judgment on appeal. It is clearly the state court’s right to establish its procedure and method of review as long as it does not distinguish between appellants on some unconstitutional basis. All appellants are treated the same, so there is no validity to such an argument. There is no other constitutional argument presented. Further, the right to appeal to the Arkansas court is not a constitutional right, as appellate review is purely a statutory right. Such review procedure is not a necessary part of a legal system, required by due process, nor is the right of appeal an inherent or inalienable right. *Ex Parte Abdu*, 247 U.S. 27 (1918). The appeal being a privilege given by the state, then it is for the state to determine its method of review unless the petitioner demonstrates to this court that a constitutional violation has occurred, which petitioner clearly has not done.

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## CONCLUSION

For all these reasons, the respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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